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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GOOGLE INC., a Delaware corporation, Plaintiff, v. AFFINITY ENGINES, INC., a Delaware corporation, Defendant.	Case No. C 05-0598 JW (HRL) **AFFINITY ENGINES, INC.'S MOTION FOR FURTHER CASE MANAGEMENT CONFERENCE RE: SCOPE OF BRIN AND PAGE DEPOSITIONS** Date: December 5, 2005 Time: 9:00 Judge: Hon. James Ware Location: Courtroom 8, 4th Floor

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 5, 2005 at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 8, 280 South First Street, San Jose, California, defendant Affinity Engines, Inc. ("AEI") will and hereby does respectfully move for an order scheduling a further Case Management Conference on December 5, 2005. AEI requests that the Court address at that Case Management Conference the appropriate scope of the depositions of Larry Page and Sergey Brin, in light of issues raised herein and by Google in its motion for summary judgment to be filed on November 28, 2005, pursuant to the Court's prior Scheduling Order.

AEI's motion is brought pursuant to Federal Rules of Civil Procedure 16, Civil Local Rule 16-10(c) and the inherent powers of the Court to amend its prior Case Management orders and to efficiently manage the cases before it. The substantive authority for the requested deposition topics, and more generally all topics necessary for AEI to oppose Google's motion for summary judgment, is Federal Rule of Procedure 56(f). This motion is based on the following Memorandum of Points and Authorities, the Declaration of Gabriel M. Ramsey filed concurrently herewith, the papers and pleadings submitted in this action and such other matters as may be presented at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court has ordered, early in this copyright case, while discovery is just getting under way, that Google file a motion for summary judgment on ownership and substantial similarity. As the parties have discussed with the Court, Larry Page, Sergey Brin and Orkut Buyukkokten are critical witnesses whom AEI must depose in order to put forth an adequate defense to Google's motion. The Court has currently limited the Page and Brin depositions to "the single issue of their meeting with Orkut Buyukkokten."

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It would be manifestly unfair to AEI, facing a motion for summary judgment, to be deprived of adequate discovery from these crucial witnesses.

Therefore, AEI requests that the Court hold a further Case Management Conference on December 5, 2005 (the first possible date after receiving Google's motion, but before the Brin and Page depositions), in order to address the appropriate scope of the Brin and Page depositions, in light of Google's summary judgment motion. Based on Google's then-stated ownership positions, and the known information in the possession of Page and Brin, it is AEI's position that testimony by Page and Brin should be allowed on at least the following topics:

1. Larry Page's and Sergey Brin's knowledge of (a) Orkut Buyukkokten's venture to commercialize social networking software, (b) Affinity Engines, Inc., (c) Buyukkokten's preexisting work on Club Nexus, (d) inCircle.
2. Larry Page's and Sergey Brin's knowledge of Orkut Buyukkokten's work on inCircle while he was a Google employee.
3. Larry Page's and Sergey Brin's knowledge of the ownership of the inCircle and Club Nexus software.
4. Whether Larry Page and Sergey Brin had any understanding or belief that any work on the inCircle product was within the scope of Orkut Buyukkokten's employment at Google.
5. Issues regarding bias or interest of Page and Brin.

It is possible that Google's motion for summary judgment will implicate further issues as well, and AEI reserves the right to seek additional testimony after receiving and reviewing Google's motion for summary judgment. Given the potential prejudice to AEI if it is deprived of the discovery necessary to oppose Google's motion, and given the efficiency of holding a Case Management Conference once Google has filed its motion to address the appropriate deposition scope, the Court should schedule such a CMC for December 5, 2005.

II. FACTUAL BACKGROUND

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B. The Court In The Co-Pending California State Action Has Ordered The Depositions Of Brin And Page, But Those Depositions Have Not Yet Been Taken Or Scheduled.

Currently pending in the California Superior Court is a dispute between the parties regarding the ownership of the same software at issue in the instant case. Given the extensive knowledge and participation of Messrs. Brin and Page regarding the factual issues underlying the dispute, the Court in that action ordered Brin's and Page's depositions on following topics: "(1) ownership of the software at issue, (2) [Google's] hiring of Buyukkokten and (3) [Google's] decision to convert Buyukkokten's prototype software, which [AEI] claims it owned." The Court provided however that the Google PMK deposition and deposition of Orkut Buyukkoken be completed first. The depositions of Brin and Page in the California state action have not yet taken place or been scheduled pending the completion of the PMK and Buyukkokten depositions. [Ramsey Decl., Ex. 14, ¶15]

C. The Court In The Instant Action Has Ordered AEI To Defend Against A Motion For Summary Judgment On "Ownership" And "Substantial Similarity," But Has Not Granted AEI Broad Enough Scope Of The Brin And Page Depositions To Adequately Defend Against That Motion.

On September 29, 2005, the Court in the instant action entered a Scheduling Order indicating that if Google chooses to file a motion for partial summary judgment limited to (1) ownership of the allegedly copied work, and (2) substantial similarity between Plaintiff's and Defendant's work, Google should do so by November 28, 2005 and AEI's opposition would be due January 30, 2006. The Court indicated that in the context of opposing such a motion, AEI could take the depositions of Larry Page, Sergey Brin and Orkut Buyukkokten on "copyright factual issues," the specifics of which were to be determined in AEI's notice of deposition. [Ramsey Decl., Ex. 15 (9/29 Scheduling Order)]

The parties exchanged correspondence after receiving this Order and discussed the relevant topics for the Brin and Page depositions. In an effort to avoid dispute, AEI framed the Brin and Page deposition topics pertinent to ownership in the same manner as they have been articulated by the state court judge, namely: "(1) ownership of the software at issue, (2) defendant's hiring of Buyukkokten and (3) defendant's decision to convert Buyukkokten's prototype software, which plaintiff claims it owned." [Ramsey Decl., Ex. 16 (10/11/05 Letter)] It was AEI's position that Brin's and Page's knowledge and understanding touching on these areas would be pertinent to the copyright ownership issues in the instant case and provided notice of the topics by letter. [*Id.*] AEI made it clear that it would also seek further testimony on copyright factual issues, to be determined, as well as bias and interest. [*Id.*] The parties were able to schedule the depositions of Larry Page and Sergey Brin for December 8 and December 15, respectively, but were unable to agree on the scope of the depositions. [Ramsey Decl., Ex. 17 (10/13/05 Letter)]

Without the benefit of any briefing, the parties addressed the issue again at a further Case Management Conference on October 15, 2005

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e. AEI in no way intended to suggest that this was the *only* issue pertinent to ownership in the instant matter. [Ramsey Decl., ¶19] Nonetheless, on October 17, 2005, the Court entered a further Scheduling Order limiting the scope of the depositions of Larry Page and Sergey Brin to "the single issue of their meeting with Orkut Buyukkokten." [Ramsey Decl., Ex. 18 (10/17 Scheduling Order)] In so limiting the scope of the Brin and Page depositions, it appears that the Court may have believed that the testimony on the three broad topics in the state action has occurred, will occur at the currently scheduled depositions, or was not pertinent to the copyright issues. To the contrary, Google takes the position that it will not provide testimony of Brin and Page on those topics at the currently scheduled depositions and will limit the scheduled depositions solely to the "meeting." As discussed herein, it is AEI's position that, [redacted] REDACTED [redacted] Google's forthcoming motion for summary judgment and Google's refusal to provide the testimony ordered in the state case, that limiting the Brin and Page depositions to the "meeting" with Buyukkokten is inappropriately narrow and unfairly prejudicial to AEI.

III. ARGUMENT

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In order to defend against Google's motion for summary judgment on ownership of the allegedly copied work (to be filed on November 28) AEI must be allowed to explore all of these issues. T[redacted]

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and will elucidate whether Buyukkokten's work for AEI was within the scope of his Google employment. Based on AEI's understanding of Google's ownership positions, AEI believes that in order to adequately defend against Google's motion for summary judgment, testimony from Page and Brin will be required on at least the following topics:

1. Larry Page's and Sergey Brin's knowledge of (a) Orkut Buyukkokten's venture to commercialize social networking software, (b) Affinity Engines, Inc., (c) Buyukkokten's preexisting work on Club Nexus, (d) inCircle.

2. Larry Page's and Sergey Brin's knowledge of Orkut Buyukkokten's work on inCircle while he was a Google employee.

3. Larry Page's and Sergey Brin's knowledge of the ownership of the inCircle and Club Nexus software.

4. Whether Larry Page and Sergey Brin had any understanding or belief that any work on the inCircle product was within the scope of Orkut Buyukkokten's employment at Google.

5. Issues regarding bias or interest of Page and Brin.

Google's motion for summary judgment may require discovery on other issues as well. AEI will be severely prejudiced in its ability to defend against Google's motion for summary judgment if it is not provided the opportunity to explore, during the Brin and Page depositions, the full range of relevant issues raised by Google's motion for summary judgment.

Indeed, this is precisely the purpose of FRCP 56(f), which provides that a court may refuse or continue an application for judgment if discovery is necessary for the party opposing the motion to state facts essential to justify the party's opposition. *See* FRCP 56(f). As the Supreme Court has put it, Rule 56(f) prevents an opposing party from being "railroaded" by a premature motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). The

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See Burlington Northern Santa Fe R.R. Co. v.

Assiniboine & Sioux Tribes of Fort Peck Reservation, 323 F. 3d 767, 773-74 (9th Cir. 2003) (where summary judgment motion brought early in case, courts should freely grant Rule 56(f) discovery and such motions are subject to lower standard of specificity).

B. A Case Management Conference Should Be Scheduled After Filing Of Google's Motion For Summary Judgment, But Before The Page And Brin Depositions, In Order To Re-Assess The Proper Deposition Scope In Light Of Google's Motion.

Pursuant to FRCP 16 and Civil L.R. 16-10(c), AEI requests a further case management conference, to occur after Google files its motion for summary judgment (but before the Brin and Page depositions), in order address the scope of testimony from Page and Brin necessary for AEI to oppose Google's motion. AEI requests that the case management conference be scheduled for Monday, December 5, 2005. This is the only possible date for a Case Management Conference on the Court's regular calendar, occurring after Google files its motion (on November 28, 2005), but before the Brin and Page depositions (scheduled for December 8 and 15, 2005).

The Court has broad discretion to schedule Case Management Conferences, in order to promote efficient and fair proceedings. *See* FRCP 16(a) (With respect to case management conferences, "[i]n any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it. . ."); Adv. Comm. Notes to 1983 Amendments to Rule 16(e) ("the amended rule encourages more extensive pretrial management than did the original, two or more conference may be held in many cases"; "By not imposing any limitation on the ability to modify a pretrial order, the rule reflects the reality that in any process of continuous management, what is done at one conference may have to be altered at the next"). Given the potential prejudice to AEI if it is deprived of the discovery necessary to oppose Google's motion, and given the obvious efficiency of holding a CMC to adjust the deposition scope in light of Google's motion, but before the depositions are scheduled to proceed, the court should promptly schedule a Case Management Conference for December 5, 2005. Such a conference would promote the purposes articulated in FRCP 16(a) of "expediting the disposition of the action" and "discouraging wasteful pretrial activities." *See* FRCP 16(a).

Civil Local Rule 16-10(c) makes it clear that the Court may schedule such case management conferences *sua sponte*. *See* Civil L.R. 16-10(c). Google has refused to stipulate to scheduling the proposed Case Management Conference, requiring AEI to file the instant motion. [Ramsey Decl., ¶21] Given that the Court has discretion to schedule the conference on its own motion, it most certainly has discretion to do so upon receipt of this motion, regardless of opposition by Google. In the interests of fairness and efficiency, AEI respectfully requests that the Court do so.

IV. CONCLUSION

For all of the foregoing reasons, AEI respectfully requests that the Court schedule for December 5, 2005, a Case Management Conference to address the appropriate scope of the Brin and Page depositions, in light of the contents of Google's motion for summary judgment.

Dated: October 31, 2005

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ G. Hopkins Guy, III /s/
G. Hopkins Guy, III
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Affinity Engines, Inc.